

Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children

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Courts handling child abuse and neglect cases face a daunting task. Within one to three days after a child is removed from his home, a court hearing must be held to determine whether court intervention and continued removal of the child is necessary.¹ At this hearing, the court must sort through and evaluate the state's allegations and assess the various risks posed by placing the child in foster care or returning the child to one or both of his parents.² Courts must weigh the heavy emphasis the law places on preserving the family unit³ against the equally paramount mandate to keep the child safe at all costs.⁴ Courts thus

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1. See Sue Badeau et al., *A Child's Journey Through the Child Welfare System*, in CHILD WELFARE LAW AND PRACTICE 213, 224 (Marvin Ventrell & Donald N. Duquette eds., 2005).

2. For a more complete overview of how courts handle child abuse and neglect cases, see *id.*

3. Federal law mandates that states make reasonable efforts to maintain children in their homes by providing services aimed at preventing the unnecessary removal of children from their parents. See 42 U.S.C. § 671(a)(15)(B)(i)(ii) (2000). This accords with the well-recognized constitutional presumption that the welfare of children is best served in the care of their parents. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.”).

4. See 42 U.S.C. § 671(a)(15)(A) (2000) (“[I]n determining reasonable efforts to be made with respect to a child . . . the child’s health and safety shall be the paramount concern.”). See also *Prince v. Massachusetts*, 321 U.S. 158 (1944) (recognizing that the State has a broad interest in protecting the health and safety of a child).

face a daunting choice: should they risk a child's safety by returning him to a potentially dangerous parent or place the child in foster care and risk rupturing the familial bond so important to a child's healthy development?⁵

A court's struggle to resolve these competing tensions in child protective cases is exacerbated when it receives a request from a non-custodial parent—one against whom no allegations of parental unfitness have been made—to have his child placed with him. Typically these situations arise when a parent who was living apart from the child learns that the child was placed in foster care due to the acts or omissions of the other parent. The non-custodial parent appears in court and requests immediate custody of the child. At that point, the court knows very little about the parent, yet has no specific information to justify keeping the child away from him. The risk posed by placing the child with the non-custodial parent is the uncertainty created by a lack of information.⁶ Keeping the child in foster care, however, creates the possibility of irreparably damaging the child's relationship with his parent and unnecessarily placing him in a child welfare system rife with problems.⁷ Considering the magnitude of this decision, courts carefully consider the evidence and hear arguments submitted by the parties prior to issuing a ruling.⁸

5. Child welfare scholars have debated whether the current child welfare system strikes the proper balance between family preservation and protecting the child's safety. Elizabeth Bartholet, for example, contends that a pervasive "blood bias" in the child welfare system sacrifices children's interests. See ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 7-8 (1999). She alleges that the state is overly deferential to parents' rights and far too unwilling to remove children from homes in which they have been abused or neglected. *Id.* Dorothy Roberts, on the other hand, argues that the state intervenes too readily, especially in the lives of African-American families. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* viii (2002). Roberts argues that African-American families are singled out by child welfare agencies, and, as a result, African-American families are "systematically demolished." *Id.*

6. According to a recent report issued by the Urban Institute, even when non-custodial fathers requested that children be placed in their care, child welfare agencies only sought such a placement in 8% of cases. See Jeffrey M. Levin & Glenn Sacks, Op-Ed., *Giving Fathers a Chance*, BOSTON GLOBE, June 8, 2006, at A15 (summarizing results from the report). The report further indicates that "even when a caseworker had been in contact with a child's father, the caseworker was still five times less likely to know basic information about the father than the mother," and 20% of the fathers whose identity and location were known by agencies at the outset of the case were never contacted. *Id.*

7. It is undeniable that even a temporary separation from their parents can inflict significant emotional harm on children. See Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 141 n.14 (1995). "[M]ost children thrive in parental care and suffer harm if that care is significantly interrupted." *Id.* at 141. Such an experience may cause the child "grief, terror and feelings of abandonment" and may also compromise a child's "capacity to form secure attachments." Ellen L. Bassuk et al., *Determinants of Behavior in Homeless and Low-Income Housed Preschool Children*, 100 PEDIATRICS 92, 98 (1997). More detailed discussion on the harm caused by separating children from their parents, even for short periods of time, can be found in JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 32-34 (1973).

8. Appellate courts are divided on the breadth of judicial discretion permissible when making placement decisions involving non-custodial parents. Some have held that upon a finding that a child has been abused by one parent, a court possesses the broad authority to make placement decisions based solely on what it deems is best for the child. See, e.g., *In re David L.*, 733 A.2d 897, 901 (Conn. App. Ct. 1999); *In re S.G.*, 581 A.2d 771, 784 (D.C. 1990); *In re C.R.*, 646 N.W.2d 506, 515-16 (Mich. Ct. App. 2001). The parent is not presumed to be the best placement option, and the court may consider factors such as where the parent resides, with whom he lives, and his employment history when

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An extra layer of complexity is added when the non-custodial parent resides in a different state. Consider, for example, the following scenario:

Steven, a young child of separated parents, lived with his mother in the District of Columbia but enjoyed a nurturing relationship with his father, Mark, who happened to live across the border in Maryland. Steven saw Mark every weekend and looked forward to the time they spent together. Mark remained an active parent and always looked for ways to stay involved in his child's life.

One day, the Child and Family Services Agency ("CFSA") removed Steven from his mother's custody because, unbeknownst to Mark, Steven's mother was selling drugs in the home. At the time of removal, the police did not inquire about the existence or whereabouts of Steven's father, and CFSA automatically placed Steven in a foster home.

The day after Steven was removed, an initial hearing was held before a family court judge in the District of Columbia. Mark, who was only notified about the hearing by Steven's mother, appeared and requested that Steven be placed in his custody. The law presumed him to be a fit parent and the State's petition contained no allegations to the contrary. Yet upon learning that Steven's father resided in Maryland, the State requested that a home study be conducted as required by the Interstate Compact on the Placement of Children ("ICPC" or "Compact"), a uniform law enacted in every state.⁹ The judge warned that the process could take months depending on the availability of a Maryland caseworker. But due to the ICPC, the judge's hands were tied; the Compact requires a caseworker in the foreign state to conduct an assessment and approve the potential placement before a child can be placed in the home. And until the out-of-state approval is received, the ICPC prohibits the court from making the placement. Steven, thus, had to remain in foster care for the time being.

Two months later, the home study was completed and the proposed placement was denied. The Maryland caseworker was concerned that Mark lacked sufficient space in his home and failed to demonstrate sufficient expertise to care for a young child. Although she did not allege that Mark was an unfit parent as defined by state laws, the worker believed that the proposed placement was contrary to Steven's interest.¹⁰

determining placement. See, e.g., CAL. FAM. CODE § 3011 (2004); DEL. CODE ANN. tit. 13, § 722 (1999); 750 ILL. COMP. STAT. 5/602 (2005); MICH. COMP. LAWS § 722.23 (2002); N.D. CENT. CODE § 14-09-06.2(1) (2004) (providing factors for determining the best interests of the child). In these jurisdictions, the court is the ultimate arbiter of competing opinions of what is best for the child.

Other jurisdictions have circumscribed the court's discretion holding that absent clear and convincing proof that both parents are unfit, the child must be returned to the non-custodial parent. See, e.g., *In re Colin R.*, No. F045842, 2004 Cal. App. Unpub. LEXIS 11492, at *12 (Dec. 16, 2004); *In re Russell G.*, 672 A.2d 109, 114 (Md. Ct. Spec. App. 1996); *In re Mary L.*, 778 P.2d 449, 452-53 (N.M. Ct. App. 1989); *In re Cheryl K.*, 484 N.Y.S.2d 476, 477 (Fam. Ct. 1985); *In re M.L.*, 757 A.2d 849, 851 (Pa. 2000). A fitness determination only seeks to resolve whether a parent is able to meet the basic needs of the child, presuming that placement with the parent is the best option. A fit parent is entitled to custody, and the court is not permitted to make an independent determination of what it believes is best for the child absent evidence that both parents pose a danger to the child.

The struggle to develop a unified framework to address the rights of non-custodial parents highlights the difficulties of resolving the competing tensions between family preservation and a child's safety in child protective cases. Yet importantly, in all jurisdictions, regardless of the legal standard applied by courts to adjudicate placement requests made by non-custodial parents, parents are entitled to a judicial determination of their custodial rights.

9. See AM. PUB. HUMAN SERVS. ASS'N, GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN 9-12 (2002), available at http://icpc.aphsa.org/documents/Guidebook_2002.pdf [hereinafter GUIDE TO THE ICPC].

10. Determinations of whether a parent is unfit are made pursuant to state child protective laws, but

Although the court disagreed with the worker's assessment, it found, pursuant to the ICPC, that it had no legal authority to override the worker's determination.¹¹ Mark was also told that appellate procedures were unavailable and that his only remedy was to request another home inspection should his living conditions improve. Over the next year, while Mark struggled to identify how to challenge the caseworker's determination, Steven spent time in four different foster homes and three schools wondering all the while why his father refused to get him.¹²

This scenario repeats itself in courtrooms across the country.¹³ The application of the ICPC has deprived out-of-state parents of their rights and done so under a less rigorous process than that used in intrastate custodial decisions. Children are separated from their parents based solely on a finding by an administrative agency that the proposed placement would be contrary to the child's interests, a standard left undefined in statutes and regulations.¹⁴ Agencies take months to make placement decisions, and during this period, children remain in foster care.¹⁵ Once a decision is made, there may be no opportunity for parents to challenge that finding in court, and administrative review procedures, if any, are inadequate. As a result, a caseworker often becomes the ultimate arbiter not only of the child's placement but of the

the standard is considerably more deferential to the rights of the biological parents than the "best interest of the child" test. The fact that a parent is not a "model parent" is insufficient to establish her unfitness. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . ."). Even evidence of prior drug use, mental health problems, or inadequate living conditions have been deemed to fall short of meeting this high standard. See *In re B.L.*, 824 A.2d 954, 956 (D.C. 2003) ("We have said that mere existence of parent's alcoholism or substance abuse does not constitute grounds for a [neglect proceeding] unless the parent demonstrates an unwillingness or inability to properly care for the child." (internal quotation marks omitted)); *In re T.G.*, 684 A.2d 786 (D.C. 1996) (finding that evidence of dirty living conditions was inadequate to demonstrate unfitness).

11. Article III(d) of the Compact prohibits the placement of a foster child in another state prior to receiving authorization from the receiving state. The provision states that the "child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child." INTERSTATE CHILD PLACEMENT COMPACT art. III(d), reprinted in GUIDE TO THE ICPC, *supra* note 9, at 9.

12. According to the Pew Commission on Children in Foster Care, on average foster children experience three different placements. PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 9 (2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf>.

13. No statistics are available to indicate just how many parents are denied custodial rights to their children under the ICPC. This author's own experiences as an attorney at The Children's Law Center in Washington, D.C., along with the vast number of appeals filed by parents denied custody, however, support the conclusion that the number of parents affected is significant and growing. See also *infra* notes 62, 72 (noting appeals taken by parents denied ICPC approval). Responding, in part, to growing concern over this issue, the ICPC created a task force in March 2004 to examine the statute and to identify steps to improve the process of placing children across state lines. See Am. Pub. Human Servs. Ass'n, APSHA & the Rewrite of ICPC, <http://www.aphsa.org/Policy/Doc/APHSA%20&%20the%20Rewrite.pdf> (last visited Dec. 16, 2006). Recently, the group released a final draft of its proposal for consideration by state legislatures. *Id.* Although a comprehensive analysis of that report is beyond the scope of this Article, its proposals do not address the constitutional and policy concerns raised here.

14. See *infra* text accompanying notes 58-61 for further discussion of the subjective legal standard set forth in the ICPC.

15. See *infra* note 53 for a description of the delays in completing ICPC home studies.

parent's rights.

This Article will argue that the current application of the ICPC violates the constitutional and custodial rights of non-custodial parents and increases the likelihood that children will unnecessarily remain in foster care, a fate that exposes them to serious emotional and physical harms. First, the Article will address the transformation of the ICPC from a mechanism to regulate the interstate movement of children to foster homes into a means by which the state deprives non-custodial parents of their parental rights. Second, the Article will argue that such a transformation has created significant constitutional concerns. Specifically, the current application of the ICPC fails to comport with due process by delegating the sole responsibility for making the placement decision to child welfare caseworkers, by denying parents the right to have an unfavorable decision reviewed by a court, and by delaying the entire process by months. Finally, specific reform proposals will be examined, including exempting biological parents from the purview of the Compact or modifying its provisions when applied to biological parents. At the heart of these proposed changes is the need to ensure that home studies are completed in a timely manner, as well as the need to give courts, not caseworkers, the final authority to make placement decisions. Taking these steps would expedite permanency in the lives of foster children, encourage non-custodial parents to remain involved in their children's lives, and alleviate the burden on a taxed and unresponsive child welfare system.

I. THE TRANSFORMATION OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

The increasing mobility of the American populace is evident in the interstate movement of foster children. Approximately 5.5% of foster children reside in a state other than the one responsible for their care and protection.¹⁶ While some of these children are placed in foster and adoptive homes, the largest proportion is placed with close relatives in other states.¹⁷ Statistics indicate that most of these interstate placements lead to permanency for children, and two-thirds of children placed in another state remain with the families with whom they were placed.¹⁸

The necessity for the ICPC arose from that increasing mobility: as more and more potential placements involved out-of-state homes, courts struggled to assess the suitability of proposed placements, monitor foster children in such placements, and provide services to the affected children. In the 1950s, a group

16. AM. PUB. HUMAN SERVS. ASS'N, UNDERSTANDING DELAYS IN THE INTERSTATE HOME STUDY PROCESS 3 (2002) [hereinafter APHSA, UNDERSTANDING DELAYS].

17. *Id.*

18. *Id.*

of social service administrators studied the problems of children moving out-of-state for foster care or adoption placements.¹⁹ Three difficulties were identified by the group: first, the failure of statutes enacted by individual states to provide protection for children moved interstate; second, the inability of the sending state to ensure that the child received proper care and supervision in the receiving state; and third, the absence of any means to compel the receiving state to provide services in support of the foster child's placement.²⁰

To address these limitations, proposed language was drafted for an interstate compact on the placement of children for each state to enact.²¹ The Compact was intended to create a system by which states could work together to handle the supervision of interstate child placements. The final draft of the Compact was initially approved by a twelve-state conference in January 1960, and two months later, New York became the first state to ratify the ICPC.²² By 1990, every state, the District of Columbia, and the Virgin Islands had passed legislation enacting the Compact into law.²³

As drafted,²⁴ the Compact requires that appropriate state or local agencies in the state receiving the child (the "receiving state")²⁵ be notified before a

19. GUIDE TO THE ICPC, *supra* note 9, at 2.

20. Bernadette W. Hartsfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 295 (1989). The Council of State Governments, a nonprofit organization whose responsibilities include helping states address multi-jurisdictional issues, further justified the need for the ICPC, noting that

supervision of the out-of-state source from which a child may be sent into the jurisdiction is difficult or impossible. When the state having a placement law is the originating point for the child, no legally binding control may be exercised once the placement has been made, unless a really bad situation develops in the other state, is discovered by its welfare authorities and is treated as a new case needing corrective action on a wholly local basis.

Id. at 296.

21. *Id.* at 295.

22. Council of State Gov'ts, General Comments, in ROBERTA HUNT, OBSTACLES TO INTERSTATE ADOPTION 49, 49 (1972).

23. Interstate compacts provide a means through which states can resolve conflicts such as boundary disputes. *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991). Though Article I, Section 10 of the Constitution requires congressional approval prior to the formation of an interstate compact, the Supreme Court has interpreted the provision to require congressional approval only when a compact is "directed to the formation of any combination tending to increase the political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). Congressional consent to the ICPC, which has not been given, is not required because the Compact focuses wholly on adoption and foster care of children, areas of jurisdiction traditionally retained by the states. *McComb*, 934 F.2d at 479. Consequently, because the ICPC is not federal law, state courts generally handle disputes involving the ICPC.

24. The Compact contains ten articles. The articles define the types of placements and placers subject to the law, the procedures to be followed in making an interstate placement and the specific protections, services, and requirements established by the law. INTERSTATE CHILD PLACEMENT COMPACT, *reprinted in* GUIDE TO THE ICPC, *supra* note 9, at 2.

25. Article II of the Compact defines "receiving state" as "the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons." INTERSTATE CHILD PLACEMENT COMPACT art. II, *reprinted in* GUIDE TO THE ICPC, *supra* note 9, at 8. A "sending agency" is defined as "a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation,

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placement of a child can be made by out-of state persons and agencies.²⁶ Agencies in the receiving state are given the opportunity to investigate, and, if satisfied, they must notify the sending state that the proposed placement does not appear to be contrary to the child's interests.²⁷ In determining whether to approve a placement, caseworkers may look at factors such as the caretaker's income, his preferred form of discipline, the safety of the neighborhood, any proposed sleeping arrangements, the housekeeping standards, and the school performance of the other children in the home. While a state *can* consider any of the above, none of these factors *must* be considered, nor is there any uniform, codified set of regulations governing the inspection process.²⁸ If the state agency in the receiving state does not approve the proposed placement, then the Compact prohibits the placement from being made.²⁹ If an interstate placement occurs, the sending state continues to have financial responsibility for and retains jurisdiction over the child.³⁰

The ICPC created a mechanism for administrative agencies in different states to share information about the suitability of proposed placements and to continue to monitor children in those placements. Yet implementation of the ICPC has created overwhelming obstacles for out-of-state biological parents seeking to regain custody of their own children. Those obstacles have arisen for several reasons. First, the Compact's language regarding its applicability to biological parents is ambiguous. That ambiguity has permitted child welfare agencies to expand the Compact's reach to include such placements despite

association, charitable agency or other entity which sends, brings, or causes to be sent or brought any child to another party state." *Id.*

26. OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH & HUMAN SERVS., INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: IMPLEMENTATION 2 (1999).

27. To initiate an ICPC request, a local caseworker in the sending state agency submits a written ICPC request, known as an ICPC 100A, along with other information such as the child's social history, case plan, medical and financial information, and any court orders, to the sending state's ICPC office. The sending state office then transmits the materials to the receiving state's ICPC office which, in turn, forwards the packet to a local public or private child welfare agency responsible for conducting a home study of the proposed placement. The home study is completed in accordance with the requirements of the receiving state, and upon its completion, the local worker in the receiving state prepares a written report that includes a recommendation approving or denying the placement. That report is then transmitted to the receiving state's ICPC office, and based on that recommendation, the receiving state's ICPC office makes the final determination of whether to approve or deny the placement. If the placement is approved, the sending state can decide whether it still wishes to place the child; if denied, the placement cannot be made unless the problems causing the denial are remedied. APHSA, UNDERSTANDING DELAYS, *supra* note 16, at 8 (2002).

28. These standards, which are nonbinding, are listed in ICPC Form 102. Ass'n of Admins. of the Interstate Compact on the Placement of Children, Receiving State's Priority Home Study Request (Aug. 1996), <http://www.dhr.state.md.us/ssa/icpc/pdf/102.pdf>. There are no binding statutes or regulations defining the factors that must be considered in an ICPC home study.

29. Draftsman's Notes, in HUNT, *supra* note 22, at 45 ("If the public authorities find positive reason to believe that the placement would be contrary to the interests of the child, they are empowered to prevent the placement by withholding their written notification.").

30. See INTERSTATE CHILD PLACEMENT COMPACT art. V, reprinted in GUIDE TO THE ICPC, *supra* note 9, at 9 ("The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement.").

evidence that its drafters intended for its scope to be limited. Second, the Compact fails to impose any time limits for the approval process. As a result, in practice, that process often takes months, during which parents are permitted only minimal contact with their children. Third, the Compact fails to clearly establish a standard for when a placement should be denied, stating only that a denial should occur when the placement would be “contrary to the interests of the child.”³¹ While many states have their own guidelines and regulations for when a placement meets that threshold, there is ample opportunity for the biases of individual caseworkers to influence the inspection and approval process. Finally, arbitrary decisions by caseworkers are immune from judicial review, because the ICPC prohibits a court from overturning those decisions. Each of these individual problems is discussed more fully below.

While seeking to give states greater control over interstate placements, the drafters of the Compact specified that its scope was nonetheless limited. Of particular concern to the drafters was a need to preserve the ability of families to make decisions regarding their own children. They recognized that the Compact was only desirable “in the absence of adequate family control or in order to forestall conditions which might produce an absence of such control.”³² As such, Article III(a) of the Compact explicitly limits its applicability to placements of children in foster care or placements that are “preliminary to a possible adoption.”³³ The drafters further clarified that the statute did not cover placements made by parents to close family members: Article VIII(a) states that the Compact shall not apply to “[t]he sending or bringing of a child into a receiving state by his parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or non-agency guardian in the receiving state.”³⁴ The plain language of these provisions evinces the intent of the drafters to respect the integrity of the family and to allow parents to plan for the care of their own children unless the children were being placed in foster care or were being

31. INTERSTATE CHILD PLACEMENT COMPACT art. III(d), *reprinted in* GUIDE TO THE ICPC, *supra* note 9, at 9.

32. Draftsman's Notes, *supra* note 29, at 44.

33. INTERSTATE CHILD PLACEMENT COMPACT art. III(a), *reprinted in* GUIDE TO THE ICPC, *supra* note 9, at 8 (“No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.”).

34. INTERSTATE CHILD PLACEMENT COMPACT art. VIII(a), *reprinted in* GUIDE TO THE ICPC, *supra* note 9, at 10. The purpose of Article VIII(a) is

to carve out a group of persons who so positively stand in a close familial or equivalent relationship with the child that the arrangements made for care and protection are obviously of a family character rather than of a kind in which the public agencies and officials of the state should become concerned.

ICPC Secretariat Opinion No. 39 (Apr. 15, 1977), *reprinted in* AM. PUB. HUMAN SERVS. ASS'N, 1 COMPACT ADMINISTRATORS MANUAL 3.71, 3.71 (2002) [hereinafter ICPC ADMIN. MANUAL].

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adopted.³⁵

Nowhere, however, does the Compact explicitly exclude from its scope the placement of children with their non-custodial parents, and fifteen years after it was drafted, child welfare agencies began arguing for an expanded interpretation of the Compact. The desire to expand the Compact's reach is explained, in part, by the need to obtain information about a broader range of potential placements. Between the late 1950s and the mid-1970s, there was a substantial increase in the number of children in foster care³⁶ and a significant rise in the divorce rate.³⁷ As a result, children destined for foster care were more likely to have a non-custodial parent residing in another state, and state agencies needed a way to assess, monitor, and regulate those placements.³⁸

In 1974, Compact administrators from each state formed the Association of Administrators of the Interstate Compact on the Placement of Children ("AAICPC") to provide technical assistance and support to member states.³⁹ The AAICPC then enlisted the assistance of the American Public Human Services Agency ("APHSA"), a nonprofit organization that represents a variety of state interests in the field of health and human services, to act as its Secretariat and administer the ICPC.⁴⁰ Under the guidance of the APHSA, the AAICPC drafted model regulations for states to adopt to supplement the

35. The principal drafter of the ICPC, Dr. Mitchell Wendell, co-authored two articles on the ICPC, in which he made it clear that the ICPC was limited to placements in foster care and into pre-adoptive homes. See Julius Libow, *The Interstate Compact on the Placement of Children—A Critical Analysis*, 43 JUV. & FAM. CT. J. 19, 20 (1992).

36. See Tim Hacsí, *From Indenture to Family Foster Care: A Brief History of Child Placing*, 74 CHILD WELFARE 162, 174 (1995) ("During the 1960s and 1970s . . . the foster care population exploded, reaching a peak in the late 1970s. The most important factor driving skyrocketing foster care populations during this period was the rediscovery of child abuse." (citation omitted)). By 1977, 503,000 children were in foster care. Kenneth Jost, *Foster Care Crisis*, 20 CQ RESEARCHER 707, 709 (1991).

37. Between 1950 and 1980, the national divorce rate doubled. See U.S. CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 482 tbl.72 (2006), available at <http://www.census.gov/prod/2005pubs/06statab/vitstat.pdf>. In Alabama, the number of divorces increased by over 18,000. UNIV. OF ALA., CTR. FOR BUS. AND ECON. RESEARCH, ECONOMIC ABSTRACT OF ALABAMA tbl.17-5 (2000). In Utah, that number increased by nearly 6,000. UNIV. OF UTAH, BUREAU OF ECON. AND BUS. RESEARCH, STATISTICAL ABSTRACT OF UTAH 43 tbl.2 (1996). These numbers suggest that the likelihood that children will be raised by parents living apart significantly increased during the years between the drafting of the ICPC and its expanded application. As one court observed, "It is now the norm rather than the exception that some of the relatives of an abused and/or neglected child live outside of the state where the abuse and/or neglect is adjudicated." *In re Crystal A.*, 818 N.Y.S.2d 443, 445 (Sup. Ct. 2006).

38. See Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 94 (2006) ("As both divorce and nonmarital parenthood have become more common, growing numbers of children are being raised by parents who are not otherwise connected to each other.").

39. For more information about the AAICPC and its role in applying the ICPC, see Am. Pub. Human Servs. Ass'n, Association of Administrators of the Interstate Compact on the Placement of Children (ICPC) (Aug. 11, 2004), <http://icpc.aphsa.org/default.htm>.

40. *Id.* ("The Secretariat to the AAICPC provides ongoing administrative, legal and technical assistance to individual states that administer the Compact. The Secretariat provides resources and information for the purpose of resolving problems of mutual concern, and formulating common policies, practices and goals.").

provisions of the Compact. The APHSA, in its capacity as the Secretariat, issued advisory opinions interpreting the Compact as well as model regulations supplementing it. While neither the model regulations nor the advisory opinions are legally binding,⁴¹ child welfare agencies nonetheless relied upon both to justify expanding the Compact's application to settings beyond interstate adoptions and foster care placements.

The model regulations eviscerated any limitations on the Compact envisioned by the drafters. The regulations expanded the scope of the Compact by broadly interpreting limiting terms such as "placement" and "foster care." For example, Regulation 3 broadly defined a "placement" to include the "care of a child in the home of his parent, other relative, or non-agency guardian in a receiving state when the sending agency is any entity" other than a close family member. It interpreted the term "foster care" as encompassing care "by a relative of the child, by a non-related individual . . . or if 24-hour a day care is provided by the child's parent(s) by reason of a court-ordered placement."⁴² Other regulations sought to expand the Compact's application to situations in which licensed foster families with children already in their care move to another state,⁴³ in which non-custodial parents are granted custodial rights to their children and the court wishes to continue to monitor the case,⁴⁴ and in which a court reunifies a child with an out-of state parent despite a previous finding of neglect.⁴⁵ As a result, the model regulations called for the application of the Compact in situations that extend well beyond the commonly understood definitions of "foster care" and placements "preliminary to an adoption."⁴⁶

Nonbinding advisory opinions issued by the Secretariat of the Compact provided further support for child welfare agencies seeking to broaden its reach. In several such opinions, the Secretariat confirmed the new

41. *But see* Ariz. Dep't of Econ. Sec. v. Leonardo, 22 P.3d 513, 518-19 (Ariz. Ct. App. 1999) (finding Regulation No. 3 binding, noting that by "adopting the ICPC, enacting [a state statute codifying the ICPC provisions], and delegating a representative of this state to participate in the activities of the AAICPC, Arizona has implicitly agreed to accept and abide by rules or regulations duly promulgated by the AAICPC.").

42. *See* INTERSTATE CHILD PLACEMENT COMPACT, reg. no. 3, *reprinted in* GUIDE TO THE ICPC, *supra* note 9, at 15.

43. *See id.* reg. no. 1, *reprinted in* GUIDE TO THE ICPC, *supra* note 9, at 12.

44. *See id.* reg. no. 3, *reprinted in* GUIDE TO THE ICPC, *supra* note 9, at 16.

45. *Id.*

46. Federal law defines a foster home as one "for children which is licensed by the State in which it is situated or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing." 42 U.S.C. § 672(c) (2000). States have defined the term similarly. *See, e.g.,* 102 MASS. CODE REGS. § 5.02 (2005) (defining "family foster care" as "substitute parental care in a family given in a private residence for up to six foster children on a regular, 24 hour a day, residential basis by anyone other than a relative by blood, marriage, or adoption"); 51 OHIO REV. CODE ANN. § 5103.02(D) (2004) (defining "foster home" as a "private residence in which children are received apart from their parents, guardian, or legal custodian."); MICH. CT. R. 3.903(C)(4) ("Foster care" means 24-hour a day substitute care for children placed away from their parents, guardians, or legal custodians, and for whom the court has given the Family Independence Agency placement and care responsibility.").

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understanding that the Compact applies to placements with biological parents, regardless of whether the parent was accused of any wrongdoing.⁴⁷ The Secretariat rationalized that “[e]ven though the intended placement is with a biological parent in another state, it should not be assumed that conditions in the home are necessarily appropriate for the child’s needs.”⁴⁸ Furthermore, the opinion read:

In general, close relatives who do not have a legal obligation to support children may be *prima facie* considered to have family feelings for them and so to be so suitable as substitute parents as to require less investigation than strangers. However, it cannot be demonstrated that any such generalization is really protection for a particular child.⁴⁹

The Secretariat also justified the expansion of the ICPC by questioning the motives of governmental agencies, finding they were “[o]ne or more persons or agencies who cannot be presumed to have the best interests of the child at heart because of close familial ties.”⁵⁰ For example, child welfare agencies may send children to another jurisdiction to rid themselves of unwanted financial obligations or to close a court case. The Compact provides a system to ensure that the different actors in the child protective proceeding—the receiving and sending states, the Court and the parents—all act in a manner consistent with the child’s best interest.

The expanded interpretation of the Compact has created a culture within child welfare agencies that encourages application of the ICPC in *all* situations in which a child may cross state lines, thereby ignoring the plain language of the Compact that limits its applicability to placements of children in foster care or placements that are preliminary to a possible adoption.⁵¹ Nearly every child

47. Secretariat Opinion No. 32, issued in 1976, first stated that the placement of children with parents came within the scope of the Compact. ICPC Secretariat Opinion No. 32 (Sept. 8, 1976), *reprinted in* ICPC ADMIN. MANUAL, *supra* note 34, at 3.54, 3.56. This argument is further elaborated in two Secretariat Opinions. ICPC Secretariat Opinion No. 34 (n.d.), *reprinted in* ICPC ADMIN. MANUAL, *supra* note 34, at 3.58, 3.59-3.60; ICPC Secretariat Opinion No. 52 (Apr. 25, 1990), *reprinted in* ICPC ADMIN. MANUAL, *supra* note 34, at 3.106, 3.106. The three opinions together hold that if the out-of-state parent did not previously petition for and receive full or joint legal and physical custody prior to the initiation of the child protective proceeding, then the Compact applies.

48. ICPC Secretariat Opinion No. 34, *supra* note 47, *reprinted in* ICPC ADMIN. MANUAL, *supra* note 34, at 3.59.

49. ICPC Secretariat Opinion No. 29 (Apr. 7, 1976), *reprinted in* ICPC ADMIN. MANUAL, *supra* note 34, at 3.47, 3.47.

50. ICPC Secretariat Opinion No. 32, *supra* note 47, *reprinted in* ICPC ADMIN. MANUAL, *supra* note 34, at 3.56.

51. In addition to a universal policy among state child welfare agencies that the Compact applies to placements of foster children with their biological parents, state administrators have also been creative in their attempts to apply the Compact. For example, Florida authorities attempted to invoke the Compact to prevent a biological parent who was already caring for her child from moving out of state. *See State v. L.G.*, 801 So. 2d 1047 (Fla. Dist. Ct. App. 2001). In another case, the Florida Department of Children and Family Services sought to apply the ICPC to prevent a father from regaining custody of his son after the child’s mother kidnapped him and transported him out of state. *See In the Interest of D.N. and K.N.*, 858 So. 2d 1087, 1093 (Fla. Dist. Ct. App. 2003). In California, the State has argued that the Compact should prevent a child from visiting an unapproved, out-of-state parent despite a judicial finding that such visits were in the child’s best interests. *See In re Emmanuel R.*, 114 Cal. Rptr. 2d 320,

welfare agency has adopted a policy that the Compact applies to court-involved placements of children with their own parents.⁵² Regardless of the culpability of the non-custodial parent, child welfare agencies have opted to take a cautious approach that keeps families separated until an assessment of the parent is conducted and all possible concerns are addressed. Keeping children in a licensed foster home is seen as preferable to placing the child in the home of an unapproved biological parent. Often this approval process takes many months due to staff shortages, incomplete paperwork, and other bureaucratic delays.⁵³

At the center of the expanded application of the Compact endorsed by state agencies is the desire to obtain information to monitor families once a child is removed from a parent's home. From an agency's perspective, such information is necessary to ensure that the child is safe and that his needs are being addressed. Yet even after receiving such information about the biological parents, caseworkers often prefer licensed foster homes to the child's own

322 (Ct. App. 2001). Moreover, the specific language of the ICPC model regulations makes clear that the Compact only addresses placements, not visits. See ICPC reg. no. 9, *reprinted in* GUIDE TO THE ICPC, *supra* note 9, at 22-23.

52. A sampling of state websites indicates that the practice of applying the ICPC to placements with biological parents is pervasive. See, e.g., Cal. Dep't of Soc. Servs., Interstate Compact on the Placement of Children (ICPC) (July 6, 2006), http://www.childsworld.ca.gov/Interstate_328.htm; Minn. Dep't of Human Servs., Guide to the Interstate Compact on the Placement of Children (Dec. 19, 2003), http://www.dhs.state.mn.us/main/groups/children/documents/pub/dhs_id_001471.hcsp (Minnesota); Mo. Dep't of Soc. Servs., Interstate Compact on Placement of Children (Jan. 28, 2004), <http://www.dss.mo.gov/cd/icpc.htm> (Missouri); Saul Spiegel, Interstate Compact on the Placement of Children (Feb. 22, 1999), <http://www.cga.ct.gov/ps99/rpt/olr/htm/99-r-0327.htm> (Connecticut); Wis. Dep't of Health & Family Servs., Interstate Compact on the Placement of Children (Feb. 11, 2005), <http://dhfs.wisconsin.gov/Children/ICPC/prgserv/recgplcmnts.htm> (Wisconsin). In addition, model forms created by the Secretariat and used by the states include biological parents within the scope of the Compact. See, e.g., Interstate Compact on the Placement of Children Request (ICPC 100A, Aug. 2001), *in* GUIDE TO THE ICPC, *supra* note 9, app. A, at 26.

53. The APHSA recommends that an ICPC home study be completed within six weeks or thirty working days. See GUIDE TO THE ICPC, *supra* note 9, at 5. In practice, the inspection process often takes at least twice that long. State Compact administrators report waiting an average of three to four months for the entire home study to be completed. OFFICE OF INSPECTOR GEN., *supra* note 26, at 6. Others have observed that the ICPC approval process can take "between six months and one year and at times has exceeded one year." Libow, *supra* note 35, at 22; see also *A.A. v. Cleburne County Dep't of Human Res.*, 912 So. 2d 261, 268 n.5 (Ala. Civ. App. 2005) (reporting a social worker's belief that an ICPC home study would take a minimum of nine months to complete); *In re Crystal A.*, 818 N.Y.S.2d 443, 445 ("[T]he typical delay is so long that the requirement to use this process often eliminates viable alternatives from the court's consideration and thus harms the child rather than helps the child."). The long delay has drawn the attention of the National Council of Juvenile and Family Court Judges, the American Academy of Adoption Attorneys, and the American Bar Association's Steering Committee on the Unmet Legal Needs of Children, which have all passed resolutions recognizing the need to expedite the process. See Representative Tom Delay, Remarks Regarding the ICPC to the American Public Human Services Association (Mar. 29, 2004) (transcript on file with author).

Four factors have been identified as the leading causes of delay: (1) resolving financial or medical issues; (2) obtaining criminal background and child abuse checks; (3) incomplete information on the family; and (4) inadequate home studies. See APHSA, UNDERSTANDING DELAYS, *supra* note 16, at 15-18. Recently enacted federal legislation provides financial incentives to states to expedite the completion of interstate home studies. See Safe and Timely Interstate Placement of Foster Children Act of 2006, § 4(b), Pub. L. No. 109-239, 2006 U.S.C.C.A.N. (120 Stat.) 510, 512.

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parents. Agencies view foster care as the “safer option,” even though statistics do not support that assumption.⁵⁴ This tendency, described by some commentators as “defensive social work,” may be motivated by a concern for job security, fear of civil and criminal liability, and a desire to avoid the negative publicity that results from mistaken or detrimental placements.⁵⁵ Consequently, agencies overemphasize the potential risks in a biological parent’s home while underestimating the significant harm caused by the separation. Such harms may include disruption of familial relationships as well as school and community ties. The child is also at risk of multiple placements before a final foster home is found, and each such home carries the threat of abuse or neglect.⁵⁶ The difficulty in quantifying these harms, which often manifest themselves in the form of emotional difficulties that may not surface for many years, also contributes to their under-evaluation by local caseworkers and decision-makers.⁵⁷

The practice of “defensive social work,” thus, has increased the obstacles parents face in gaining custody of their children and the likelihood that those children will spend unnecessary time in foster care. For non-custodial, out-of-state parents, any presumption of parental fitness has been erased under the ICPC. Instead, such parents are required to present caseworkers with affirmative proof that they are able to meet wholly subjective standards developed by the agency before approval will be given. The standards vary from state to state and are often unwritten. Final decisions are often influenced

54. Children are not necessarily safer in foster homes. Rates of abuse and neglect, including child fatalities, are significantly higher in foster care than in the general population. See Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 FAM. CT. REV. 540, 542 (2004). Chill cites statistics from the Children’s Bureau of the U.S. Department of Health and Human Services indicating that the rate of child maltreatment was more than 75% higher—and the rate of fatal maltreatment almost 350% higher—in foster care than in the general population. *Id.* at 549 n.29.

55. See *id.* at 542 (“Defensive social work has flourished in the past 20 years, fueled by the news media’s appetite for sensational child maltreatment stories as well as by laws that purposely magnify the public visibility of child maltreatment fatalities and near fatalities. This has led to a series of removal stampedes or ‘foster care panics,’ in which thousands of children have been swept up by child welfare authorities in the aftermath of high-profile child fatalities.” (citations omitted)); see also Davis & Barua, *supra* note 7, at 139-55 (recognizing a “sequentiality effect” in child protective decisions whereby decision-makers tend to favor the status quo once a child is removed from his home). Although Chill’s analysis is focused on removals of children from custodial parents, the same factors that motivate social workers to practice “defensive social work” apply equally to placements with non-custodial parents after a child has been removed.

56. See Chill, *supra* note 54, at 544 (“[A]lthough significant risks may attend to removal and nonremoval, the latter inevitably gets more play in court hearings. . . . [I]t is much easier to overlook the less sensational and palpable risks of family separation and substitute care.”); see also *infra* note 138 and accompanying text for a discussion of some of the problems confronting children placed in foster care.

57. See Davis & Barua, *supra* note 7, at 151 (“[I]t is possible that the more dramatic and tangible risks of abuse or neglect by the respondent will overshadow the less dramatic and tangible risks of family separation and substitute care.”).

by the personal biases of individual caseworkers.⁵⁸ Evidence of a prior arrest or an old criminal conviction may be enough to fail the state's assessment.⁵⁹ A house may be "too dirty" or "too small," or a parent may lack the "expertise" to care for his child.⁶⁰ The burden, thus, is often on the parent to prove that placement of his own child is not contrary to the child's best interests. A failure to meet that burden may lead the agency to withhold approval, and without it, courts have refused to place the child with the out-of-state parent.⁶¹ The caseworker's assessment, thus, is often the sole determinant of whether a child will be placed in his parent's care.

Despite the impediments created for biological parents, courts have, for the most part, deferred to state agencies and their broad interpretations of the Compact. A majority of the courts to address the issue have found that the ICPC covers placements of children with their biological parents.⁶² These

58. See Madelyn Freundlich, *Reforming the Interstate Compact on the Placement of Children: A New Framework for Interstate Adoption*, 4 HYBRID 15, 30-31 (1997) ("[T]he Compact mandates very little concerning the approval process that the receiving state must utilize The ICPC, however, in its substantive provisions, fails to set even minimal standards for the assessment of suitability, appropriateness, and desirability of care. The outcomes for children have been at best troubling, and at worst dire.").

59. See, e.g., *In re Emmanuel R.*, 114 Cal. Rptr. 2d 320, 323 (Ct. App. 2001) (denying a placement based on an "extensive criminal record" and a "past history" with child welfare authorities); *Dep't of Servs. for Children v. J.W.*, No. CK00-03141, 2004 Del. Fam. Ct. LEXIS 143, at *3 (Apr. 1, 2004) (denying a petition primarily based on the fact that the father had more than two misdemeanor convictions).

60. See, e.g., *Adoption of Leland*, 842 N.E.2d 962, 966 (Mass. Ct. App. Feb. 24, 2006) (denying a placement because too many people lived in the home); *Adoption of Warren*, 693 N.E.2d 1021, 1023 (Mass. App. Ct. 1998) (denying a placement request because of the father's poor living conditions, extensive criminal history, and "inability fully to understand and to address his son's significant emotional and behavioral problems"); *State v. K.F.*, 803 A.2d 721, 725 (N.J. Super. Ct. App. Div. 2002) (denying a petition based in part on the fact that prior home was "cramped, cluttered and dirty" even though the current residence met all of the relevant state standards). In a case in which the author was involved, the State of Alabama denied an ICPC placement request after a mother failed to disclose that she was married to an individual who had a twenty-year old conviction. No other reason was stated for the denial.

61. See, e.g., *Green v. Div. of Family Servs.*, 864 A.2d 921, 928 (Del. 2004) (stating that the remedy for the aggrieved parents was to appeal the finding in the receiving state); *In re T.M.J.*, 878 A.2d 1200, 1203 (D.C. 2005) ("As the ICPC dictates, Maryland's refusal to approve placement of the child with [a grandmother] barred the Superior Court from ordering that disposition. Appellant's contrary argument that the trial judge was free to re-examine the evidence of her suitability and reject the Maryland administrative decision ignores the Compact as written Her remedy was to pursue whatever appeal Maryland provides from such decisions. It was not to entreat the Superior Court to impose an unauthorized placement on another state." (citations omitted)). Interestingly, the statutory sections cited in both *T.M.J.* and *Green* allegedly giving parties the right to appeal an ICPC decision in the receiving state do not specifically afford any such rights to individuals aggrieved by an ICPC decision.

62. See *Ariz. Dep't of Econ. Sec. v. Leonardo*, 22 P.3d 513, 514 (Ariz. Ct. App. 1999) (adopting the "view held by the majority of jurisdictions that have addressed this question"); *Dep't of Children & Families v. Benway*, 745 So. 2d 437, 438 (Fla. Dist. Ct. App. 1999) ("The majority of courts considering the applicability of the ICPC to out-of-state placements with natural parents have concluded that the ICPC does apply."); see also *Green*, 864 A.2d at 921 (applying the Compact to non-custodial fathers); *H.P. v. Dep't of Children & Families*, 838 So. 2d 583 (Fla. Dist. Ct. App. 2003) (holding that the Compact applies to the placement of children with their non-custodial, out-of-state mother); *Custody of Quincy*, 562 N.E.2d 94 (Mass. App. Ct. 1990) (observing that Compact should have been followed

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courts have applied similar reasoning to reach this conclusion and have summarily dismissed any constitutional concerns. The reasoning of these courts is as follows: when a child enters foster care, the rights of *both* parents are diminished as the state assumes temporary physical and legal custody of the child. Therefore, the rights of the non-custodial parent are limited as a result of alleged abuse by the other parent. In other words, as soon as *one* parent is alleged to be abusive, “no inference of fitness for placement may be made” for *either* parent.⁶³ Any subsequent placement recommended by the state and ordered by the court while the case is ongoing is considered a form of foster care, and thus the ICPC governs.⁶⁴ Moreover, even if the child is placed with a biological parent, the child continues to be considered in foster care until the court’s supervision of the family is terminated and the case is closed.⁶⁵ Even though the non-custodial parent bears no responsibility for his child’s involvement in the foster care system, the fact that the child is in that system places the parent within the “category of persons to whom the ICPC applies.”⁶⁶

To support this analysis, these courts often cite the definitions of “foster care” and “placement” provided in the model regulations, despite the fact that, unlike the Compact itself, most states have not enacted the nonbinding regulations into law.⁶⁷ The courts reason that states, by entering into the Compact, “implicitly agreed to accept and abide by rules or regulations duly promulgated by the AAICPC.”⁶⁸ Furthermore, courts cite to Article X of the

when child placed with out-of-state parent to insure that child would receive appropriate services); *Adoption of Warren*, 693 N.E.2d at 1021 (terminating a father’s rights because he lived out-of-state and was deemed to be an inappropriate placement pursuant to the ICPC); *Orsborn v. Montana DPHHS*, No. DV 04-30, 2004 Mont. Dist. LEXIS 3524, at *11 (19th Jud. Dist. Ct. May 10, 2004) (upholding the application of the ICPC to a proposed placement of a foster child with the non-custodial biological father); *State Juvenile Dep’t of Clackamas County v. Smith*, 811 P.2d 145 (Ore. Ct. App. 1991) (holding that the Compact *does* apply to a child who is sent to another state for placement with parents or relatives when someone other than a parent or relative makes the placement).

63. *Leonardo*, 22 P.3d at 520. The court explained that it was not presuming the non-custodial parent to be unfit, but was only requiring that “he or she must be investigated to ensure that the child will be safe if placed with that parent.” *Id.*

64. *H.P.*, 838 So. 2d at 586 (“[W]hen a court takes jurisdiction and determines who is to receive a child, who retains the authority to continue the child with that custodian or to remove the child, and when the court may prescribe supervision or other conditions, the child’s living status is that of a *placement*. In such circumstances, the parent’s situation is not custody or possession as a matter of parental right, but rather it is the same as the position of a foster parent. In both instances they are caregivers only because of the authority conferred to them by the state acting through the court. When a child is with a caregiver under these circumstances, the child is in foster care.”).

65. *Id.* (“[T]he ICPC applies to the interstate placements with parents . . . until such time as the interrupted parent-child relationship is restored and the state’s intervention is ended.”).

66. *Leonardo*, 22 P.3d at 522.

67. *See, e.g., id.* at 518.

68. *Id.*; *see also* *Green v. Div. of Family Servs.*, 864 A.2d 921, 927-28 (Del. 2004) (applying model regulations). *But see H.P.*, 838 So. 2d at 585 n.3 (acknowledging the argument that the model regulation “should not be recognized . . . because it was promulgated by an entity outside of Florida and not subjected to the requirements . . . for the promulgation of regulations”). Although Article VII of the ICPC empowers each member state to designate an officer to coordinate activities under the Compact and to have the power to promulgate rules and regulations, nowhere does the statute provide an

ICPC which provides that the Compact “shall be liberally construed to effectuate the purposes thereof.”⁶⁹ As they thus conclude, because the purpose of the Compact is to protect foster children who are subject to interstate placements, the ICPC should be broadly applied to all such possible placements.⁷⁰ One court reasoned:

[O]nce a court has legal custody of a child, it would be negligent to relinquish that child to an out-of-state parent without some indication that the parent is able to care for the child appropriately. The ICPC provides an effective mechanism⁷¹ for gleaning that evidence and for maintaining a watchful eye over the placement.

Implicit in these court decisions is a preference for “safe” licensed foster care homes rather than the potentially harmful home of a parent who has done nothing wrong but whom the state has not approved for whatever reason.

By contrast, the only federal court to address the issue held the ICPC to be inapplicable to biological parents, thereby aligning itself with decisions from at least four state courts.⁷² *McComb v. Wambaugh*,⁷³ a seminal case out of the

exemption from complying with other statutory provisions governing the procedures to issue regulations. Some states, such as Massachusetts, have promulgated regulations for the Compact. See 110 MASS. CODE REGS. 7.507 (2005).

69. INTERSTATE CHILD PLACEMENT COMPACT art. X, reprinted in GUIDE TO THE ICPC, *supra* note 9, at 11; see, e.g., *Leonardo*, 22 P.3d at 520; *Green*, 864 A.2d at 926; *Orsborn v. Montana DPHHS*, No. DV 04-30, 2004 Mont. Dist. LEXIS 3524, at *11 (19th Jud. Dist. Ct. May 10, 2004).

70. *Green*, 864 A.2d at 926 (“Since its purpose is to protect children who are subject to placement in another state, the ICPC should be read to encompass placement of a dependent child with a non-custodial parent.”).

71. *Dep’t of Children & Families v. Benway*, 745 So. 2d 437, 439 (Fla. Dist. Ct. App. 1999); see also *Leonardo*, 22 P.3d at 522 (“It is in the best interests of a child who is the subject of a dependency proceeding and in the custody of protective services to require an investigation by a receiving state on the suitability of a parent who does not have full custodial rights before placing the child with that parent.”).

72. *McComb v. Wambaugh*, 934 F.2d 474 (3d Cir. 1991) (finding the ICPC inapplicable when a state returned a child to a parent living in another state); *Ark. Dep’t of Human Servs. v. Huff*, 65 S.W.3d 880 (Ark. 2002) (finding that a trial court could return children to their mother without receiving the receiving state’s approval under the ICPC); *Tara S. v. Superior Ct. of San Diego County*, 17 Cal. Rptr. 2d 315 (Ct. App. Mar. 10, 1993) (upholding a trial court’s ruling that a non-custodial father had a right to custody despite the ICPC); *Dep’t of Servs. for Children v. J.W.*, No. CK00-03141, 2004 Del. Fam. Ct. LEXIS 143 (Apr. 1, 2004) (upholding a trial court’s ruling that it is not a “placement” within the scope of the ICPC to give a child to his father after the death of the child’s mother); *In re Mary L.*, 778 P.2d 449 (N.M. Ct. App. 1989) (finding that the ICPC could not be used to prevent a fit, non-custodial parent from assuming custody of her child); *In re Rholetter*, 592 S.E.2d 237 (N.C. Ct. App. 2004) (finding that the trial court had discretion to return children to their biological mother without proper ICPC approval); see also *N.J. Div. of Youth & Family Servs. v. K.F.*, 803 A.2d 721, 728-29 (Super. Ct. App. Div. N.J. 2002) (ruling that the ICPC is not applicable to relative placements, as “[t]he ICPC was intended to remove, not to create, obstacles to out-of-state placements that are in the best interests of children,” and “[i]t would be nonsensical to use the ICPC . . . to prohibit a court’s placement of children with their natural family solely because that family resides in another state”). California has the most well developed case law on this issue, with at least six decisions holding that the Compact is inapplicable to placements with biological parents. See *In re Alicia F.*, No. E036318, 2005 Cal. App. Unpub. LEXIS 10587 (Nov. 18, 2005); *In re Kirsten T.*, No. B177936, 2005 Cal. App. Unpub. LEXIS 8617 (Sept. 22, 2005); *In re Colin R.*, No. F045842, 2004 Cal. App. Unpub. LEXIS 11492 (Dec. 16, 2004); *In re Markelle T.*, Nos. A099841, A100016, 2003 Cal. App. Unpub. LEXIS 5676 (June 11, 2003); *In re Johnny S.*, 47 Cal. Rptr. 2d 94 (Ct. App. 1995); see also *In re Emmanuel R.*, 114 Cal. Rptr. 2d 320, 322 (Ct. App. 2001) (ruling that ICPC approval was not required for a parent to visit his child).

73. *McComb* involved a situation in which a child was severely physically abused after being

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Third Circuit, lays out the basic argument relied upon by courts to find the ICPC inapplicable to biological parents.⁷⁴ The court first noted that Article III of the ICPC specifically limits the Compact's scope to placements of children in foster care or preliminary to an adoption.⁷⁵ Thus, the court concluded, the plain language of the Compact excludes its application to any placement with a biological parent.⁷⁶ As the court further noted, such a limitation reflected the established intent of the drafters to protect the social and legal rights of the family.⁷⁷ The *McComb* court acknowledged that the AAICPC subsequently created model regulations broadly interpreting the Compact to apply to biological parents, but it disregarded those regulations because they were directly contrary to the explicit language of the original Compact: "A regulation cannot be upheld if it is contrary to the statute under which it was promulgated."⁷⁸ Accordingly, "read as a whole the Compact was intended only to govern placing children in substitute arrangements for parental care."⁷⁹

Despite the variety of specific holdings reached by all of the courts to address the applicability of the ICPC to biological parents, each court's inquiry has focused exclusively on questions of statutory interpretation. Missing entirely is any consideration of the significant constitutional issues at stake when biological, non-custodial parents are temporarily or even permanently deprived of the ability to care for their children as a result of the ICPC approval process. Parents' ability to gain custody of their own children currently hinges on the often unreviewable discretion of an agency caseworker, whose subjective determination will dictate their future relationship with the child. As discussed below, such a system has serious constitutional implications that currently are not being addressed.

returned to the care of his biological mother. 934 F.2d at 476-77. The evidence revealed that social workers in Pennsylvania, where the child and the mother resided, refused to conduct requested home studies and failed to monitor the placement. *Id.* The tragedy only further emphasizes the need for communication between the different actors in a child protective case and the importance of reducing the strain on a taxed foster care system to ensure that those working in the system can devote their limited resources on the cases that need the most attention.

74. See, e.g., *Huff*, 65 S.W.3d at 887-88; *K.F.*, 803 A.2d at 727-28 (specifically relying on the reasoning applied in *McComb*).

75. *McComb*, 934 F.2d at 480.

76. See also *J.W.*, 2004 Del. Fam. Ct. LEXIS 142, at *11 ("[T]he natural devolution of custody to a parent is not a 'placement' within the scope of the ICPC."); *Rholetter*, 592 S.E.2d at 243 ("When the statutory language is clear and unambiguous, there is no room for judicial construction and the courts must give the words of the statute their plain meaning.").

77. *McComb*, 934 F.2d at 481.

78. *Id.* at 481 (quoting *Consulting Eng'rs Council v. State Architects Licensure Bd.*, 560 A.2d 1375, 1376 (Pa. 1989)).

79. *Id.* at 482.

II. CONSTITUTIONAL CONCERNS RAISED BY APPLICATION OF THE ICPC TO BIOLOGICAL PARENTS

The current application of the ICPC to placements with non-custodial biological parents raises at least two distinct due process concerns. First, parents against whom no findings of unfitness have been made are temporarily denied custody of their children for lengthy time periods while a state agency conducts a home study.⁸⁰ Second, after the home study is completed, agency caseworkers have the power to effectively terminate the parent's relationship with the child by finding that the placement would be contrary to the child's interest, a wholly subjective standard. The ICPC denies courts the ability to make the ultimate decision, and the parent is not given an adequate opportunity to appeal the caseworker's determination in either an administrative or judicial proceeding. As will be discussed more fully below, both of these elements of the ICPC violate the procedural due process rights of non-custodial biological parents.

As the Supreme Court has long established, "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."⁸¹ The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."⁸² Consideration of what procedural protection is due in any given circumstance must begin with a determination of the private interest that has been affected and the nature of the governmental action involved.⁸³

Here, the private interest involved is significant. Applying the ICPC to biological parents both temporarily and indefinitely deprives them of their right to direct the upbringing of their children, one of the "oldest fundamental liberty interests recognized by the [Supreme] Court."⁸⁴ The Court's decisions

80. See *supra* note 53 (discussing delays in the completion of an ICPC home study).

81. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

82. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1985); see also *Mathews*, 424 U.S. at 333; *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

83. See *Mathews*, 424 U.S. at 335; *Goldberg*, 397 U.S. at 262-63.

84. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Supreme Court has long recognized the fundamental right of parents to make decisions regarding the upbringing of their children. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s]' to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring))); *May v. Anderson*, 345 U.S. 528, 534 (1953) ("[A] mother's right to

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“establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”⁸⁵ The Court has held that the autonomy of the family unit is protected by the Fourteenth Amendment Due Process and Equal Protection Clauses as well as the Ninth Amendment.⁸⁶ The law’s concept of the family rests on a presumption that parents are best suited to raise and care for their own children.⁸⁷ The fact that some parents may, at times, act contrary to the best interests of their children has not convinced the Court to discard that presumption: “The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.”⁸⁸

Supreme Court doctrine has looked to the parent’s relationship with the child to determine whether the relationship is entitled to constitutional protection. Its rulings establish that such protection generally extends to non-custodial parents who remain involved in their children’s lives: “When an unwed father demonstrates a full commitment to the responsibilities of parenthood by ‘[coming] forward to participate in the rearing of his child,’ his interest in personal contact with his child acquires substantial protection under the Due Process Clause.”⁸⁹ Thus, in *Lehr v. Robertson*, the Court upheld a New York statute that did not require that a father be notified of his child’s impending adoption because the father had failed to take meaningful steps toward establishing a parental relationship with his child.⁹⁰ The Court reasoned:

custody of her children is a personal right entitled to at least as much protection as her right to [property].”).

85. *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

86. *Stanley*, 405 U.S. at 651 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (Due Process Clause); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (Equal Protection Clause); and *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (Ninth Amendment)).

87. *See Parham*, 442 U.S. at 602 (“The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”).

88. *Id.* at 602-03.

89. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)). *But see Michael H.*, 491 U.S. 110 (upholding a state statute that denied a putative father who had formed a strong relationship with his child any rights to the child because the child had a legal father (the mother’s husband) as defined by state law). In light of the decision in *Michael H.*, Professor Deborah Forman argues that the following principles apply when ascertaining whether the Constitution protects a father’s relationship with his child:

First, the biological connection itself does not make a man a father. To qualify as a father, the man must also establish a social relationship with the child. Second, the satisfaction of the biology plus formula is necessary but not sufficient to establish fatherhood. Whether a man will be recognized as a father will depend to a great extent on the nature of the relationship he has maintained with the mother and whether his recognition will disrupt any existing formal family units.

Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 977-78 (1994).

90. *Lehr*, 463 U.S. at 248.

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.⁹¹

Similarly, in *Quilloin v. Walcott*, the Court held that a biological father who had minimal contact with his child could not disrupt a child's adoption into a family with whom the child had already been living.⁹² In both decisions, the Court prevented parents who had not made efforts to establish a relationship with their children from using the Constitution as a sword to disrupt their child's permanent placement.

When, however, the parent *has* established such a relationship, the Court has prevented states from infringing upon that intact parent-child bond without providing adequate process. For example, in *Caban v. Mohammed*, the Court struck down a New York statute that denied a father the right to object to an adoption that the biological mother had already consented to. Although the decision was based on Equal Protection grounds, the Court's holding centered on the fact that the father was just as involved in the children's upbringing as their mother.⁹³ Similarly, in *Stanley v. Illinois*, discussed in further detail below, the Court prohibited the state from temporarily removing children from a father with whom they had been living intermittently throughout their lives without first demonstrating that he was unfit.⁹⁴ Although the Court has never described the specific actions a non-custodial parent must take to qualify for constitutional protection, the Court's rulings make clear that involved non-custodial parents are entitled to at least some constitutional protection for their relationship with their children.

The importance the Constitution places on a parent's relationship with his child imposes a high burden on a state attempting to disrupt that relationship. In *Stanley*, the Court specified the procedures states must follow in such circumstances. *Stanley* concerned an Illinois law under which the State automatically placed children of unwed fathers in foster care upon their mother's death.⁹⁵ The record revealed that Mr. Stanley had intermittently cared for his children throughout their lives and that upon their mother's death, he had located friends to care for the children.⁹⁶ The State, emphasizing its *parens*

91. *Id.* at 262.

92. 434 U.S. 246 (1978).

93. 441 U.S. 380, 382 (1979) (finding that the Equal Protection Clause was violated when the state treated the biological father, who was actively involved in his children's lives, differently than the mother).

94. 405 U.S. 645 (1972).

95. *Id.* at 645.

96. *Id.* at 646.

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patriae powers,⁹⁷ argued that it took responsibility for the child upon the death of the unmarried mother. The State sought to shift the burden of proving parental fitness onto the non-custodial father, whom it said could establish his ability to care for the child by filing for guardianship or adoption, the options a legal stranger to the child could pursue.⁹⁸

The Court rejected the state's argument and held that the Constitution requires, as a matter of due process, that the father have a "hearing on his fitness as a parent before his children were taken from him."⁹⁹ The state's interest in efficiency did not permit it to presume all unmarried fathers to be unfit:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.¹⁰⁰

In other words, the Court made clear that depriving parents of their custodial rights prior to a judicial determination of their fitness is forbidden under the Constitution.

Situations involving the procedural rights of out-of-state, non-custodial parents are more complicated. Typically, in cases implicating the ICPC, a child will have entered the foster care system because of abuse inflicted by the custodial parent. Due to the exigency of the circumstances, the state may not have the opportunity to locate the out-of-state parent or to determine if he is willing and able to care for the child. The state therefore assumes protective custody prior to any hearing on the out-of-state parent's fitness, and, in the process, infringes on the non-custodial parent's rights.

In extraordinary situations, courts have permitted state agencies to deprive individuals of a protected constitutional interest without a prior hearing so long as a court hearing is provided expeditiously thereafter.¹⁰¹ The problem with the ICPC framework, however, is that parents who have had their custodial rights limited due to exigent circumstances never receive that hearing. First, they are

97. *Parens patriae*, according to *Black's Law Dictionary*, refers to "the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

98. *Stanley*, 405 U.S. at 647.

99. *Id.* at 649.

100. *Id.* at 656-57.

101. See *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) ("[A]n individual [must] be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." (citations omitted)); *Robinson v. Via*, 821 F.2d 913, 921 (2d Cir. 1987) ("[I]t was, and remains, equally well established that officials may temporarily deprive a parent of custody in 'emergency' circumstances 'without parental consent or a *prior* court order.'" (quoting *Duchesne v. Sugarman*, 566 F.2d 817, 826 (2d Cir. 1977))); *Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir. 1983) ("When a child's safety is threatened, that is justification enough for action first and hearing afterward.").

denied the ability to obtain custody of their child for months, if not longer, pending an investigation into their suitability to parent the child.¹⁰² During that time, the Compact strips courts of the power to place the child with her parent.¹⁰³ The parent will be fortunate if the court orders extended visits, which are prohibited by the nonbinding ICPC model regulations.¹⁰⁴

Second, if the caseworker believes that the placement would be “contrary to the interests of the child,” the parent cannot challenge that finding in court. Rather, the state can continue the separation indefinitely, effectively terminating the parent’s rights because the Compact explicitly prohibits courts from placing children absent the approval of the state agency.¹⁰⁵

Not only is there no judicial review of agency determinations, but often there is no administrative process to review a negative ICPC decision. In the majority of states, there is no established administrative process to review an ICPC denial.¹⁰⁶ The Compact itself contains no description of the process, if any, that a state must create for a parent to appeal a negative decision. Consequently, informal procedures govern this area. Some states do not allow for an appeal of any kind. Others require the sending state to resubmit an ICPC request after the situation leading to the denial has improved. This process, which again may take several months, is not an appeal of the original decision given that it presupposes that something in the parent’s living situation was wrong and must change before the receiving state will readdress the suitability of the placement. These states do not permit the initial denial to be challenged.

Even states that provide more formal procedures for reviewing ICPC home inspection decisions fail to give parents the more stringent procedural safeguards the Constitution requires. Massachusetts is one of few states that specifically grants an individual aggrieved under the ICPC the right to an administrative hearing.¹⁰⁷ The procedures governing that hearing, however,

102. See *supra* note 53 (discussing delays in the process).

103. See INTERSTATE CHILD PLACEMENT COMPACT art. III(d), *reprinted in* GUIDE TO THE ICPC, *supra* note 9, at 9.

104. The model regulations restrict the court’s ability to send the child on an extended visit with his parent while the request for ICPC approval is pending. See INTERSTATE CHILD PLACEMENT COMPACT reg. no. 9, *reprinted in* GUIDE TO THE ICPC, *supra* note 9, at 23 (“A request for a home study or supervision made by the person or agency which sends or proposes to send a child on a visit and that is pending at the time the visit is proposed will establish a rebuttable presumption that the intent of the stay or proposed stay is not a visit.”). In addition, the regulation presumes that any visit longer than thirty days is deemed a placement rather than a visit and is thus impermissible under the Compact. *Id.* Although the regulations are not binding, many courts routinely treat them as settled law. See, e.g., *Ariz. Dep’t of Econ. Sec. v. Leonardo*, 22 P.3d 513, 518-19 (Ariz. Ct. App. 2001).

105. See *supra* note 11.

106. In the preparation of this Article, ICPC offices in every state were surveyed concerning the existence and extent of procedures available to review home inspection denials. Workers in thirty-five states responded that no process existed to appeal an ICPC denial. Twelve state offices stated that some such process existed. In three states, workers did not know the answer to the question. Results of this survey are on file with the author.

107. 110 MASS. CODE REGS. 7.523 (2005).

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demonstrate the illusory nature of the right. In the hearing, the parent bears the burden of proving, by a preponderance of evidence, that the “[d]epartment or provider acted without a reasonable basis or in an unreasonable manner which resulted in substantial prejudice to the aggrieved party.”¹⁰⁸ The rules of evidence do not apply,¹⁰⁹ and the hearing officer “shall not recommend reversal of the clinical decision made by a trained social worker if there is a reasonable basis for the questioned decision.”¹¹⁰ In addition, if an “area director” or a “clinical review team” made the home study decision, the hearing officer lacks the authority to reverse it without the approval of the Commissioner of the Department of Human Services.¹¹¹

Similar problems exist in utilizing state administrative procedures to challenge ICPC home inspection denials. First, some states do not permit administrative challenges to decisions made pursuant to statutes that do not explicitly grant persons the right to such an appeal, which the ICPC does not.¹¹² Even if such challenges are allowed, parents often face a nearly insurmountable burden: they must demonstrate that the agency’s decision was erroneous, an almost impossible task because the decision is based on a subjective standard and is influenced largely by the personal opinion of the caseworker. Hearing officers will therefore be reluctant to find such decisions “clearly erroneous” because the decision is based on an inherently subjective determination.¹¹³ Moreover, administrative hearings lack many procedural protections common in judicial proceedings: the rules of evidence are relaxed, and parties have no access to discovery, for example, making it more difficult for non-custodial parents to introduce evidence proving that the agency erred in its ICPC determination.¹¹⁴ Requirements that litigants exhaust all administrative

108. *Id.* at 10.05.

109. *Id.* at 10.21(1).

110. *Id.* at 10.05.

111. *Id.*

112. *See, e.g.*, MICH. COMP. LAWS § 24.203(3) (2004) (defining “contested case” to mean a “proceeding . . . in which a determination of the legal rights, duties or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing”).

113. When reviewing “best interests” decisions made by trial judges, appellate courts have largely deferred to lower courts’ findings due to the subjectivity and malleability of the legal standard. *See, e.g.*, *Rutledge v. Harris*, 263 A.2d 256, 257 (D.C. 1970) (recognizing the limits on revisiting a trial court’s determination of a child’s best interests); *In re A.H.*, 748 N.E.2d 183, 194 (Ill. 2001) (“The trial court is vested with wide discretion in its determination of the best interests of the minor in temporary custody hearings . . .”); *Francois v. Leon*, 834 So. 2d 1109, 1113 (La. 2002) (“In cases involving the custody of children, the trial court is vested with a vast amount of discretion. The trial court is in a better position to evaluate the best interest of a child . . .”). There is no reason to think that trial courts will not similarly defer to caseworkers applying a best interest standard to their decisions.

114. *See, e.g.*, D.C. CODE § 2-509(b) (2005) (“Any oral and documentary evidence may be received.”); MICH. COMP. LAWS § 24.275 (2005) (“[A]n agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. . . . [A]n agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.”).

procedures before seeking judicial review of a placement decision adds further delay to an already lengthy process that a parent must endure to gain custody of his own child.¹¹⁵

These problems typify the hurdles that non-custodial parents must overcome to invoke their rights to care for their children. And while in states like Massachusetts parents can ascertain the uphill battle they face, in others, the absence of regulations or statutes establishing a review process leaves parents without any means to know what they need to do to get their children back. In those states, once an administrative review fails, the burden falls on the parents, many of whom may not have the assistance of counsel, to invent creative causes of action to obtain judicial review of an ICPC denial.¹¹⁶ As one might guess, this creative lawyering rarely occurs, and an initial denial by the state caseworker often results in a de facto termination of the parent's relationship with his child.¹¹⁷ Despite the Supreme Court's repeated emphasis on the sanctity of the parent-child relationship, in the case of an out-of-state parent, that relationship can be permanently severed based solely on the subjective, potentially nonreviewable determination of a single caseworker.

Thirty years ago, the Second Circuit, in *Duchesne v. Sugarman*, criticized a decision-making framework in which the State of New York systemically violated the constitutional rights of parents and then placed the burden on the parents to seek redress for the violations.¹¹⁸ The court wrote:

[T]he state cannot constitutionally "sit back and wait" for the parent to institute judicial proceedings. It "cannot . . . [adopt] for itself an attitude of 'if you don't like it, sue.'" The burden of initiating judicial review must be shouldered by the government. . . . [T]he state cannot be allowed to take action depriving individuals of a most basic and essential liberty which those uneducated and uninformed in

115. Typically, a litigant must exhaust all administrative remedies prior to seeking judicial recourse. See, e.g., MICH. COMP. LAWS § 24.301 (2004) ("When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, . . . the decision or order is subject to direct review by the courts as provided by law.").

116. While indigent parents are entitled to court-appointed attorneys for custody hearings, it is unlikely that a court-appointed attorney will be willing to initiate a separate action to obtain judicial review of a negative ICPC decision. "The most striking thing about the practice of law in [the child protective] area is the gross inequality of representation. This is the only area of law in which the party most in need of effective assistance of counsel [the parent] is least likely to obtain it." Kathleen A. Bailie, Note, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2310 (1998) (citation omitted). Pay for court-appointed attorneys representing parents is at a level too low to allow for effective representation and many attorneys do not get compensated for work done outside of the courtroom. See Astra Outley, Representation for Children and Parents in Dependency Proceedings 8, <http://pewfostercare.org/research/docs/Representation.pdf> (last visited Dec. 16, 2006). See also N.Y. Lawyers' Ass'n v. State, 763 N.Y.S.2d 397 (Sup. Ct. 2003) (describing the inadequate representation parents receive in family court proceedings). Consequently, court-appointed attorneys do minimal work outside the courtroom and rarely get involved in related proceedings such as ICPC determinations.

117. See, e.g., *Adoption of Leland*, 842 N.E.2d 962, 965 (Mass. Ct. App. Feb. 24, 2006) (reviewing a trial court's decision to terminate a non-custodial parent's rights based, in part, on an ICPC denial); *Adoption of Warren*, 693 N.E.2d 1021, 1024-25 (Mass App. Ct. 1998) (same).

118. 566 F.2d 817 (2d Cir. 1977).

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legal intricacies may allow to go unchallenged for a long period of time.¹¹⁹

Yet the current application of the ICPC, which deprives parents of custody of their children without a determination of parental unfitness, has avoided judicial scrutiny for forty years. The majority of courts have endorsed the broad interpretation of the Compact asserted by state agencies, and consequently out-of-state, non-custodial parents continue to face enormous obstacles when trying to obtain custody of their children in foster care.¹²⁰ The next Part suggests possible reforms to address this issue and explains why implementation of these reforms is necessary to further the interests of foster children.

III. REFORM PROPOSALS

Thus far, courts have failed to identify, explore, and confront the constitutional problems raised by application of the ICPC to non-custodial, biological parents. Current practice must be reformed to provide these parents with a timely opportunity to be heard as part of a speedy process to obtain custody of their children. Several possibilities for reform exist.

First, courts could find, consistent with the plain language of the ICPC, that the Compact does not apply to placements of children with biological parents, even if those parents are out of state.¹²¹ As a result, the juvenile court with jurisdiction over the child would retain all decision-making authority over his placement, and the state agency in the receiving state would be divested of any power in the process. Under this model, the out-of-state, non-custodial parent would be treated identically to a non-custodial parent living in the same state as the child. Courts confronted with a request from a parent to obtain custody of a child would hold a timely hearing and would make a determination regarding the child's custody according to state law. At this hearing, all parties would have the opportunity to present evidence relevant to the placement decision and the court would make its decision based on such information.¹²² And while the child would likely be placed temporarily in an in-state foster home while the decision is being made, this proposal would at least ensure that out-of-state parents are treated identically to those residing in-state.

Critics of this proposal may argue that removing biological parents from the

119. *Id.* at 828 (citations omitted). In *Duchesne*, the Second Circuit held that New York violated a mother's constitutional rights by failing to seek judicial ratification of a decision to remove children from their mother. The court rejected the State's argument that the burden was on the mother to seek judicial recourse for the deprivation. *Id.*

120. See discussion *supra* Part I.

121. See *supra* text accompanying notes 72-78 for the persuasive argument made by courts holding that the ICPC does not apply to biological parents.

122. In this era of rapid technological advancement, much of the information needed to evaluate the potential placement could be obtained without traveling to the other state. "Today, so many records are computerized and the local [child welfare] agency through computer searches and telephone interviews can obtain almost as much information about the interested relatives as the out-of-state agencies located where the relatives reside." *In re Crystal A.*, 818 N.Y.S.2d 443, 445 (Sup. Ct. June 30, 2006).

ambit of the ICPC would deprive juvenile courts of vital information about the suitability of an out-of-state parent's home. They might further note that the ICPC emerged due to the difficulties agencies and courts had in obtaining such information and might argue that the Compact established a cooperative framework to allow child welfare agencies to address this need.

Establishing a cooperative framework, however, need not sacrifice the due process rights of parents, and alternative possibilities for gathering that information exist. The ICPC is not the exclusive means utilized by states to address the needs of children placed out of state. Child welfare agencies routinely contract with licensed private foster care groups such as Catholic Charities, Lutheran Social Services, and Bethany Christian Services to assess potential placements, license foster parents, and monitor children in homes.¹²³ Courts and states could make greater use of such arrangements to help ensure that home studies of biological parents are completed in a more timely manner. The result of this home study could be admitted into evidence at the custody hearing at which a judge, not a caseworker, would have the final authority to approve or deny the placement. While such a system might be more expensive, any increased financial costs created cannot outweigh the continued deprivation of a parent's fundamental constitutional right.¹²⁴

A second possibility for reform exists. Courts could maintain the current ICPC framework but modify its application when the interests of biological parents are implicated. For example, if an out-of-state parent requests placement of his child, the receiving state could continue to bear responsibility for conducting the home study and making an initial recommendation about the parent's suitability. But under this modified approach, the home study would have to be conducted on an expedited basis,¹²⁵ and a court, either in the sending or receiving state, would possess the exclusive authority to make the ultimate

123. See, e.g., *In re Markelle T.*, Nos. A099841, A100016, 2003 Cal. App. Unpub. LEXIS 5676, at *19 (June 11, 2003) (observing that California could enter into contracts with out-of-state agencies to conduct home studies in lieu of the ICPC process); *In re Johnny S.*, 47 Cal. Rptr. 2d 94, 100-01 (Ct. App. 1995) (same).

124. The Supreme Court has consistently rejected a state's interest in financial savings as a justification for depriving a parent of a fundamental constitutional right. See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 122 (1996) (minimizing the importance of a state's financial interests when compared to the right of a parent to preserve a relationship with her child); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 28 (1981) ("But though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here."); *Boddie v. Connecticut*, 401 U.S. 371, 381 (1971) (finding that a state's financial considerations were not sufficient to overcome the plaintiff's interest in dissolving a marriage); see also *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972) (requiring evidentiary hearings on unfitness despite the fact that "[p]rocedure by presumption is always cheaper and easier than individualized determination").

125. See GUIDE TO THE ICPC, *supra* note 9, at 5 (recommending that ICPC requests be processed within thirty days). In addition, recently enacted federal legislation defines a "timely interstate home study" as one completed within thirty days after receipt of the request. See Safe and Timely Interstate Placement of Foster Children Act of 2006, Pub. L. No. 109-239, § 4(b), 2006 U.S.C.C.A.N. (120 Stat.) 510, 512.

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placement decision after a hearing at which the parent could be heard. In other words, while the state agency would still conduct the home study, a court would retain all decision-making authority.

Both of these proposals share two elements. First, once a biological parent appears and asserts his right to custody, the time for the state agency to investigate the home must be limited. Current studies take months to complete, and the delays are not constitutionally permissible.¹²⁶ Home studies must be expedited and information must be transmitted to courts immediately.

Second, the final placement decision must rest with the court, not an administrative agency. Not only does the Constitution afford parents the right to a judicial determination of their fitness, but courts are better equipped to evaluate all of the relevant information, including the subjectiveness of the inspection process and the possible biases of caseworkers in determining what is best for children. The standard for ICPC home inspections—whether the proposed placement is contrary to the child's interests—is amorphous and undefined. Vesting child welfare caseworkers with the exclusive discretion to make this determination, as the ICPC currently does, permits them to deny parental placements based solely on their subjective assessments of the suitability of the proposed placement.¹²⁷ Racial, cultural, and sex-based prejudices can inject themselves in these determinations. Moreover, the reasons for a denial may not even be revealed, particularly if these decisions are not reviewable.¹²⁸ By vesting decision-making authority in a court, these biases will be minimized, and justice will no longer vary depending on whether a parent is fortunate enough to get a qualified, competent, and sensitive caseworker to conduct the home study.

Empowering courts to make interstate placement decisions would improve the process in a number of other ways. First, the amount of reliable information that would be considered prior to the issuance of a decision would increase. The traditional investigative tools available to litigants in civil cases, such as

126. See *supra* note 53 (discussing delays in the process).

127. See ROBERTS, *supra* note 5, at 55 ("Vague definitions of neglect, unbridled discretion, and lack of training form a dangerous combination in the hands of caseworkers charged with deciding the fate of families Unlike child abuse that can at least be substantiated with physical evidence, the vague definition of neglect is highly susceptible to biased evaluations of harm based on the parents' race or class or on cultural differences in child rearing.").

128. Some critics have suggested that racially based decision-making may explain why a disproportionate number of children of color enter foster care. For example, many more white women than women of color, including pregnant women and parents, use illicit drugs. However, studies show that African-American children prenatally exposed to illicit drugs are much more likely than white children to be reported to protective services and are more likely to be placed in foster care, even after taking into account factors such as the family's previous child welfare involvement, the physical health of the child, and other related factors. See Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 *FUTURE OF CHILDREN* 75, 80 (2004); see also ROBERTS, *supra* note 5, at 47-55 (summarizing studies indicating racial bias in child welfare decision-making).

subpoena power and discovery, would ensure that parties could pursue and present all relevant information at a fitness hearing.¹²⁹ In addition, zealous advocacy, including rigorous cross-examination, would test the veracity of allegations and competing versions of relevant facts. The rules of evidence would also apply and could be used to exclude unreliable, prejudicial, or irrelevant evidence.¹³⁰

Second, decision-making would be enhanced in a court setting because it would impose formality and rigid procedure on a system that is currently dominated by informality and subjectivity.¹³¹ Unlike a caseworker who may make a decision in a vacuum, a court would hear from both sides.¹³² A court would know that its decision was subject to appellate review, and it would be required to explain the basis for its decision. Written opinions from the trial court and appellate review would create greater transparency in the process and

129. See *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (“[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”). In child protective proceedings, discovery is often expedited in light of the need to resolve these matters quickly. See, e.g., MICH. CT. R. 3.922(A), 3.972(A) (requiring trial to be held within sixty-three days of the placement of the child by the court, or, if the child is not in placement, within six months of the filing of a petition, and mandating that discovery be completed within twenty-one days before trial).

130. See *Idaho v. Wright*, 497 U.S. 805, 819 (1990) (“The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination.” (citations omitted)); *Perry v. Leeke*, 488 U.S. 272, 283 n.7 (1989) (“‘The age-old tool for ferreting out truth in the trial process is the right to cross-examination.’ For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law.” (quoting *United States v. DiLapi*, 651 F.2d 140, 149-50 (2d Cir. 1981) (Mishner, J., concurring))); *Goldberg*, 397 U.S. at 269 (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”).

131. See Amy Sinden, “*Why Won’t Mom Cooperate?: A Critique of Informality in Child Welfare Proceedings*,” 11 YALE J.L. & FEMINISM 339, 354 (1999) (“The fallacy, of course, is that this claim treats the ‘best interest of the child’ as some objectively determinable absolute, when in fact it is an extremely malleable and subjective standard. In fact, the parent and the agency social worker may have two entirely different ideas of what is in the child’s ‘best interests.’” (citations omitted)). Sinden argues that in child welfare proceedings “[w]here so much is at stake . . . the players in the system are all the more likely to make snap judgments based on gut feelings and instinct and to cut corners in an attempt to manipulate decisions to conform to their own view of the right outcome.” *Id.* at 380; see also MARTHA FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 107 (1991) (characterizing the “best interest” standard as “amorphous, undirected, incomprehensible and indeterminate”).

132. *Troxel v. Granville*, 530 U.S. 57 (2000), highlights the diverging views that often exist when determining what is best for a child. In that case, the child’s mother determined that her children’s best interests would be served by permitting their paternal grandparents to visit once a month. *Id.* at 61. There, the grandparents filed suit seeking increased visitation time, and the trial court granted it, disagreeing with the mother’s decision. *Id.* Washington’s state supreme court reversed that ruling, and the United States Supreme Court affirmed. *Id.* at 57. The Court found that the trial court erred by making a decision solely based on what it deemed to be best for the child rather than deferring to the wishes of the fit parent. As Justice O’Connor observed, “[T]his case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children’s best interests.” *Id.* at 72.

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consistency among placement decisions by generating specific factors that courts must consider when making such decisions. This would be a substantial improvement over the current process, in which diverging bases for denying ICPC placements are common.

Perhaps most importantly, the suggestions provided here would improve outcomes for children. Expediting placement decisions would ensure that foster children learned more quickly of their future plans and had a faster opportunity to achieve stability and permanency in their lives. The importance to children of speed in the placement process is endorsed by federal law and is the guiding principle in child welfare decision-making.¹³³ The emphasis on permanency is “meant to provide the child with psychological stability and a sense of belonging, and limit the likelihood of future disruption of the parent-child relationship.”¹³⁴ As one recent study found, “frequent moves in and out of the home of strangers can be profoundly unsettling for children, particularly when they do not know how long they will stay or where they will go next.”¹³⁵ One child growing up in foster care told interviewers conducting the study that he checked every day to see if his belongings had been packed in anticipation of another move.¹³⁶

Not surprisingly, children in foster care suffer a wide range of effects including mental health problems and poor academic performance. Some find themselves caught up in the juvenile delinquency system.¹³⁷ Although these

133. The Adoption and Safe Families Act requires that the court must hold a hearing to plan for a foster child's permanency within twelve months from the date the child enters foster care. 42 U.S.C. § 675(5)(C) (2000). The Supreme Court has also recognized the harm that a lack of permanency will inflict on children. “[I]f there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.” *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

134. Donald N. Duquette, *Establishing Legal Permanence for the Child*, in CHILD WELFARE LAW AND PRACTICE, *supra* note 1, at 363, 363.

135. PEW COMM'N ON CHILDREN IN FOSTER CARE, *supra* note 12, at 9.

136. *Id.*

137. Researchers estimate that 30% to 80% of children in foster care exhibit emotional or behavioral problems. Mary Ellen Cox et al., *Willingness To Foster Special Needs Children and Foster Family Utilization*, 24 CHILD. & YOUTH SERVS. REV. 293, 298-317 (2002). Within three months of placement, many children exhibit signs of depression, aggression or withdrawal. Chipungu & Bent-Goodley, *supra* note 128, at 85. Some children may exhibit signs of sleep disturbance, eating disorders, self-stimulation, rocking, or failure to thrive. Mark D. Simms et al., *Health Care Needs of Children in the Foster Care System*, 106 PEDIATRICS 909, 912 (2000).

Foster children also experience problems at school. As a recent report noted:

They have higher rates of grade retention, lower scores on standardized tests, and higher absenteeism, tardiness, truancy and dropout rates. Children in care are twice as likely to drop out of school . . . and almost forty percent of children who ‘age out’ of care will never receive a high school diploma.

Children's Def. Fund, *Improving Education for Children in Foster Care with Disabilities*, http://campaign.childrendefense.org/childwelfare/adoption/improving_education.aspx (last visited Dec. 16, 2006).

After leaving the system, many foster children end up in jail or on public assistance, or otherwise represent an economic cost to society. See *generally* WESTAT, INC., A NATIONAL EVALUATION OF TITLE IV-E FOSTER CARE INDEPENDENT LIVING PROGRAMS FOR YOUTH, PHASE 2: FINAL REPORT (1991).

problems may manifest themselves for a number of reasons, the uncertainty of their living situation and the prolonged separation from their parents is an important and recognized contributing factor.¹³⁸ Often children assume they entered the system because they did something wrong or because their parents no longer want them.¹³⁹ These assumptions are only reinforced when she remains in foster care for months despite the availability of a non-custodial parent who is willing and able to care for the child.

Children would also benefit from a system that encourages biological parents to remain involved in their lives. If the child protective system deprives non-custodial parents of their rights for an indefinite period of time without any judicial recourse and absent any legitimate justification, the disempowered parent may feel disillusioned and view the process as futile. He may stop attending court hearings, refuse to comply with court orders, and drop out of his child's life.¹⁴⁰ The system cannot afford to alienate caring parents who wish to remain involved. Moreover, giving parents an opportunity to be heard in a meaningful and transparent court proceeding increases the likelihood that they will remain an active participant in their child's life.

Finally, divesting caseworkers of the sole discretion to veto a placement and vesting that power instead in courts would improve the decision-making process as discussed above and would increase the likelihood that children will be placed with their family rather than the foster care system.¹⁴¹ The foster care

(describing the problems faced by children living in foster care). A study of employment outcomes for youths aging out of the foster care found that many were underemployed and progressing more slowly in the labor market than other low-income youths, and only half had any earnings in the two years after aging out of care. OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, DEP'T OF HEALTH & HUMAN SERVS., EMPLOYMENT OUTCOMES FOR YOUTH AGING OUT OF FOSTER CARE (2002), available at <http://aspe.hhs.gov/hsp/fostercare-agingout02/>.

138. See Rosalind D. Folman, *"I Was Taken": How Children Experience Removal from Their Parents Preliminary to Placement into Foster Care*, 2 ADOPTION Q. 7 (1998) (describing the trauma experienced by children removed from their parents and placed in foster care).

139. The Pew Commission reports that "[s]ome children in foster care don't understand why they were removed from their birth parents and blame themselves. Most don't know whether or when they will rejoin their parents or become part of a new, permanent family." PEW COMM'N ON CHILDREN IN FOSTER CARE, *supra* note 12, at 9. One former foster child stated:

When I was in foster care, it didn't seem like I had any choices or any future. All kids deserve families. They need a family, to have someone, this is father, this is mother—they need a family so they can believe in themselves and grow up to be somebody. This is a big deal that people don't realize. I wish everyone could understand.

Id.

140. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court discussed the immense importance of giving litigants an opportunity to be heard. The Court stated:

[W]ith the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievement without the anxieties that will beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."

Id. at 374.

141. A study by the National Council of Juvenile and Family Court Judges showed that strengthening the procedural protections enjoyed by parents, specifically a parent's right to counsel,

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system should be seen as a place of last resort for children, not a “safer” first choice. Already, the foster care system is overwhelmed: over half a million children remain in the system, and each year, more children enter foster care than exit it.¹⁴² Social workers and attorneys handling these cases are overwhelmed.¹⁴³ Child abuse investigations are not completed in a timely fashion, social workers and attorneys do not visit children once they are placed, and court hearings do not take place in accordance with federal guidelines.¹⁴⁴ On numerous occasions, child welfare agencies have lost track of children in their custody or have failed to monitor a child’s placement resulting in serious harm to the child.¹⁴⁵ Children in foster care are moved repeatedly, and the system lacks sufficient funds to offer quality services to families that take foster

increased the likelihood that children would be reunified with their parents by 20%. The study further found that the chances that termination of parental rights occurred decreased by approximately the same percentage. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, IMPROVING PARENTS’ REPRESENTATION IN DEPENDENCY CASES: A WASHINGTON STATE PILOT PROGRAM EVALUATION 7 (2003).

142. Based on the latest statistics on foster care supplied by the states for the Adoption and Foster Care Analysis and Reporting System (AFCARS). See Dep’t of Health & Human Servs., The AFCARS Report: Preliminary FY 2005 Estimates as of September 2006 (2006), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.pdf. In 2005, there were 513,000 children in foster care, almost double the number in care in the early 1980s.

143. Caseworkers burn out and leave the profession in very high numbers; 90% of state child welfare agencies report difficulty in recruiting and retaining workers. See Chipungu & Bent-Goodley, *supra* note 128, at 83. The annual turnover rate in the child welfare workforce is 20% for public agencies and 40% for private agencies. ANNIE E. CASEY FOUND., THE UNSOLVED CHALLENGE OF SYSTEM REFORM: THE CONDITIONS OF THE FRONTLINE HUMAN SERVICE WORKFORCE 48 (2003).

Attorneys representing children also suffer from burnout caused by high caseloads and low pay. It is typical for children’s attorneys to represent more than one hundred children at any given time. For example, prior to the filing of a federal class action lawsuit, children’s attorneys in Fulton County, Georgia represented over 400 children, and attorneys in DeKalb County represented over 200 children. See *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1362 (N.D. Ga. 2005). At the same time, children’s attorneys fall at the bottom of the pay scale. The lowest median income among all practicing attorneys was earned by those working in nonprofit organizations. These attorneys earned less than a third of what lawyers in the highest paid employment category made, yet they carry enormous student loans. See Miriam Aroni Krinsky, *New Study Shows the Need for Loan Forgiveness*, 24 ABA CHILD L. PRAC. 7, 107-08 (2005). Consequently, children’s attorneys have a difficult time remaining in the field. See also Editorial, *A Legal Hand for Foster Children*, S.F. CHRON., Sept. 28, 2005, at B8 (“[W]ith many of these lawyers burdened with overwhelming student loans, poorly compensated posts and outrageous caseloads, many are being forced out of these roles that foster children so desperately rely on.”).

144. In 2001 and 2002, the federal government conducted audits known as Child and Family Services Reviews (CFSR) in thirty-two states to review compliance with federal laws. See Ben Kerman, *What is ... the Child and Family Services Review*, VOICE, Fall 2003, at 35, available at http://www.caseyfamilyservices.org/pdfs/casey_voice-iv_2.pdf. Based on evaluating factors such as protecting children from abuse and neglect, maintaining children safely in their homes, ensuring the continuity of family relationships, and providing adequate services to children, the Department of Health and Human Services found that the majority of states were “not in substantial conformity.” *Id.* at 2. One-third of the states did not have an adequate case review system as required by federal law; “[o]nly five states met the criteria for protecting children from abuse and neglect,” and “[n]one of the states reviewed satisfied the permanency outcome of providing children with permanency and stability in their living situations.” *Id.* Ultimately, not one state passed the review. *Id.*

145. See, e.g., Jack Kresnak, *Across the Country, Concerns Mount About Child Welfare Agencies: Cases of Missing Prompt Call for Reform*, BOSTON GLOBE, Aug. 30, 2002, at A3 (noting that Michigan could not locate 302 abused and neglected children). The Florida Department of Child and Family Services had lost track of 500 children in the previous year. *Id.*

children in. Why would a system under siege seek to keep children under its control while turning away biological parents willing and able to care for their children? Placing children with fit, non-custodial parents would allow the system to address the needs of those children who desperately need its protection.

CONCLUSION

Sacrificing process for efficiency is an unfortunate trend in child protective proceedings, and the treatment of out-of-state, non-custodial parents represents one manifestation of that trend. Denying a parent the opportunity for a judicial determination of fitness and preventing him from obtaining custody of his child violates his procedural due process rights. To remedy this situation, courts must retain the ultimate decision-making authority when the fundamental rights of non-custodial parents are involved. Such a result will enable courts to protect the rights of those parents and to make better decisions for the children involved. The solutions proposed here will expedite permanency in the lives of foster children, encourage non-custodial parents to remain involved in their children's lives, and reduce the burden on a taxed child welfare system.